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20
21 UNITED STATES DISTRICT COURT
22
23 NORTHERN DISTRICT OF CALIFORNIA
24
25 SAN FRANCISCO DIVISION

26 RICHARD GREGORY, On Behalf of Himself) Case No.: C-04-4293-VRW
27 and All Others Similarly Situated,)
28 Plaintiff,) CLASS ACTION
1 vs.)
2 CHIRON CORPORATION, HOWARD H.)
3 PIEN, JOHN A. LAMBERT and DAVID V.)
4 SMITH,)
5 Defendants.)
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1 On February 9, 2009 this Court entered an Order (Docket # 197), which, found that the
 2 proposed “Final Order and Judgment” submitted by the Parties under the terms of the Settlement
 3 Stipulation (Docket #186) does not comply with FRCP 54(a)¹ and 58(a).² The February 9, 2009
 4 Order (Docket # 197) provides among other things “Counsel are requested to review the attached
 5 proposed form of judgment and inform the court whether it meets with their approval. In
 6 addition, counsel should prepare a proposed from of order to resolve any outstanding issues that
 7 require judicial resolution in order to implement their settlement.”

8 Submitted herewith as Exhibit A, is a proposed form of Judgment in substitution for the
 9 Court’s proposed form (Docket #197-2), and, submitted as Exhibit B, is a proposed separate
 10 form of Order Approving Class Action Settlement, Plan of Allocation and Common Fund Fee
 11 and Expense Award. “to resolve any outstanding issues that require judicial resolution in order to
 12 implement their settlement.”

13 Plaintiff’s Counsel and Defendants’ Counsel have conferred and Defendants’ Counsel
 14 have authorized Plaintiff’s Counsel to represent that they join in this response.

15 Revised Proposed Judgment Form (Exhibit A):

16 A. *Required Addition of Class Findings:*

17 Plaintiff’s Counsel submit that because this is a class action, the judgment to be entered
 18 herein is required by FRCP 23(c)(3)(B)³ to “describe those to whom the Rule 23(c)(2) notice
 19 was directed, who have not requested exclusion, and whom the court finds to be class members.”

20
 21 ¹ FRCP 54(a) provides “**Definition, Form.** “Judgment” as used in these rules includes a decree and any
 22 order from which an appeal lies. A Judgment should not include recitals of pleadings, a master’s report, or a record
 23 of prior proceedings.”

24 ² FRCP 58(a) provides “**Separate Document.** Every judgment and amended judgment must be set out in a
 25 separate document, but a separate document is not required for an order disposing of a motion: (1) for judgment
 26 under Rule 50(b); (2) to amend or make additional findings under Rule 52(b); (3) for attorneys fees under Rule 54;
 27 (4) for a new trial, or to alter or amend the Judgment under Rule 59; or (5) for relief under Rule 60.”

28 ³ FRCP 23(c)(3)(B) provides “**Judgment.** Whether or not favorable to the class, the judgment in a class
 29 action must: . . . (B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the
 30 Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class
 31 members.”

1 The attached proposed Judgment (Exhibit A) includes, as paragraph 1, a description of those to
 2 whom the Rule 23(c)(2) notice was directed. The attached proposed Judgment includes, as
 3 paragraph 2, a list of the only persons or entities who have requested exclusion. The attached
 4 proposed Judgment, at paragraph 3, describes whom the court finds to be class members.

5 B. *Deletion of language that Plaintiff shall recover \$30 million plus:*

6 As part of the Settlement (reflected in paragraph 30(a) of the Stipulation), the parties
 7 agreed to settle the Action without any concession of liability on the Defendants' part and,
 8 indeed, Defendants expressly deny liability. The formulation in the Court's proposed form of
 9 judgment that "Lead Plaintiff . . . shall recover from defendants . . . the sum of \$30 million
 10 plus . . ." is a form of words often found in judgments following determinations of liability.
 11 Accordingly, the parties believe it would be more appropriate, and consistent with the agreed
 12 terms of the settlement, to replace this language with the formulation " Defendants shall pay to
 13 Lead Counsel's escrow account for the benefit of the Settlement Class, in Settlement of the
 14 Action, the sum of \$30 million plus interest thereon in an amount equivalent to interest at the
 15 thirty-day Treasury Bill rate from June 6, 2006 to the date of payment of this judgment."

16 C. *Addition of provisions Approving Settlement and Dismissing Action:*

17 In addition to the payment provision, the proposed Judgment (Exhibit A) includes, as
 18 paragraph 5 a provision finding the Stipulation to be a fair, reasonable and adequate settlement
 19 and directs the parties to consummate it in accordance with its terms. Further, the proposed
 20 Judgment at paragraph 6 provides for the dismissal of the Consolidated Amended Complaint,
 21 with prejudice, and except as provided in the Stipulation, without costs.

22 D. *Addition of Reservation of Jurisdiction And Rule 54(b)Certification:*

23 Under the terms of the Stipulation, the parties request the Court to retain jurisdiction over
 24 the parties and the Class Members for the administration, interpretation, effectuation or
 25 enforcement of the Stipulation. Such continued jurisdiction will be needed for purposes of
 26 administering and distributing the settlement proceeds to the Class Members. Accordingly the
 27 proposed Judgment (Exhibit A) includes, as paragraph 7, a reservation of jurisdiction.

1 Nevertheless the complaint will be dismissed with prejudice and **all** claims against **all** defendants
 2 released, so it is appropriate to include as paragraph 8 a Rule 54(b) certification so there is no
 3 question that the Judgment is a final appealable order, notwithstanding the reservation of
 4 jurisdiction for these limited purposes.

5 E. *Addition of Court's Direction to Clerk to Enter Judgment:*

6 Pursuant to FRCP 58(b)(2),⁴ the Court's approval (not just Clerk's approval) is required
 7 for the form of judgment when the judgment grants "relief not described in" FRCP 58(b). FRCP
 8 58(b) limits the Clerk's authority to enter a judgment without the Court's approval to where the
 9 jury returns a general verdict, the Court awards only costs or a sum certain, or the court denies all
 10 relief. As any proposed judgment herein must comply with FRCP 23(c)(3)(B) and should
 11 comply with the Stipulation's provisions for approving the Settlement and dismissing the
 12 Complaint, it is beyond the Clerk's authority to enter without the Court's approval. Accordingly,
 13 the attached proposed Judgment adds a signature line for the Court's approval of the form of
 14 judgment.

15
 16 Revised Proposed form of "Order Approving Class Action Settlement,
Plan of Allocation and Common Fund Fee and Expense Award" (Exhibit B):

17 In accordance with this Court's February 9, 2009 Order (Docket # 197), The parties have
 18 prepared the attached proposed Order Approving Class Action Settlement, Plan of Allocation
 19 and Common Fund Fee and Expense Award, which includes, in one form of Order, all of the
 20 remaining provisions we submit are needed "to resolve any outstanding issues that require
 21 judicial resolution in order to implement their settlement." This one proposed Order, together
 22 with the proposed Judgment, would substitute for the three forms of orders previously submitted
 23 as Docket Nos. 186, 187 and 188 (which were updated and re-filed as Docket Nos. 196-1, 196-3,
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26 ⁴ FRCP 58(b)(2) provides "**Court's Approval Required.** Subject to Rule 54(b) the court must promptly
 27 approve the form of judgment, which the clerk must promptly enter, when: (A) the jury returns a special verdict
 28 with answers to written questions, or (B) the court grants other relief not described in this subdivision (b)."

1 and 196-5) for approving (i) the Settlement, (ii) the Plan of Allocation, and (iii) payment of the
 2 Attorneys Fees and Expenses from the common fund recovery.

3 As previously stated, the Stipulation requires entry of orders substantially in the forms
 4 provided for approval of the Stipulation to become final, and for the Settlement to become
 5 effective. The proposed form of Order includes the following provisions which we submit are
 6 required "in order to implement their settlement": (i) finding jurisdiction of the parties and class
 7 members (paragraph 1); (ii) finding that the prerequisites for a class action under Federal Rules
 8 of Civil Procedure 23 (a) and (b)(3) have been satisfied (paragraph 2); (iii) finally certifying this
 9 action as a class action on behalf of a defined class with particular exclusions (paragraph 3); (iv)
 10 finding that the notice given constituted due and sufficient notice to all persons and entities
 11 entitled thereto (paragraph 4); (v) approving the Settlement as being fair, reasonable, and
 12 directing the parties to consummate it (paragraph 5); (vi) providing for the dismissal of the
 13 Complaint, with prejudice and without costs (paragraph 6); (vii) providing for the release and
 14 discharge by Plaintiffs and all Class Members of the "Released Claims" as defined in the
 15 Stipulation (Paragraphs 7 and 8); (viii) providing for the release and discharge by Defendants of
 16 the "Released Defendants Claims" as defined in the Stipulation (Paragraph 9); (ix) confirming
 17 that the Orders entered under the Settlement shall not be construed as an admission or concession
 18 of any thing (paragraph 10); (x) making a finding, as required by the PSLRA, that all parties and
 19 their counsel have complied with each requirement of Rule 11 of the Federal Rules of Civil
 20 Procedure as to all proceedings herein.

21 In addition, the unified proposed form of Order includes the provisions to effectuate the
 22 approval of the Plan of Allocation (paragraph 12) and to implement the payment of the
 23 attorneys' fees and expenses approved by the Court (paragraph 13).

24 Finally the proposed form of Order includes provisions to return the parties to the status
 25 quo in the event the Order does not become Final (by e.g., being vacated, modified or reversed
 26 on appeal) (paragraph 14).

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DATED: February 27, 2009

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JEFF S. WESTERMAN

/s/ Jeff S. Westerman

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DECLARATION OF SERVICE BY MAIL2
I, the undersigned, declare:3
1. That declarant is and was, at all times herein mentioned, employed in the County
4 of Los Angeles, over the age of 18 years, and not a party to or interest in the within action; that
5 declarant's business address is One California Plaza, 300 South Grand Avenue, Suite 3900, Los
6 Angeles, California 90071-3149.7
2. That on February 27, 2009, declarant served the foregoing PLAINTIFF'S
8 RESPONSE TO FEBRUARY 9, 2009 ORDER by depositing a true copy thereof in a United
9 States mailbox at Los Angeles, California in a sealed envelope with postage thereon fully
10 prepaid and addressed to the parties listed on the attached Service List.11
3. That there is a regular communication by mail between the place of mailing and
12 the places so addressed.13
4. That a true and correct copy of this document is being e-mail served to the
14 following persons who commented on the settlement by e-mail:15
(a) Mr. Steve Rogers at [mailto:roges57@yahoo.com];
16
(b) Ms. Laurie Lamb at [mailto:bllamb@earthlink.net];
17
(c) Mr. Jerome Gleim at [mailto:JGleim@aol.com];
18
(d) Mr. Leland G. Coe at [mailto:leecoe@paulbunyan.net];
19
(e) Roy W. Fogle and Patricia A. Fogle, Trustees of the Roy W & Patricia A.
20 Fogle Trust dated 12/28/1998 at [mailto:prfogle@sbcglobal.net]; and21
(f) Mr. Peter Williamson and Ms. Margaret Williamson at
22 [mailto:pwmcw@cox.net].23
5. That on the above date, declarant served via e-mail to: scac@law.stanford.edu.24
I declare under penalty of perjury that the foregoing is true and correct. Executed this
25 27th day of February, 2009, at Los Angeles, California.26
27
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ELIZABETH VILLALOBOS

SERVICE LIST

1
2 *Richard Gregory v. Chiron Corporation, et al.*
3 USDC ~ San Francisco - Case No.C-04-4293-VRW

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28	PLAINTIFF'S RESPONSE TO FEBRUARY 9, 2009 ORDER CASE NO.:C-04-4293-VRW	-8 -

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PLAINTIFF'S RESPONSE TO FEBRUARY 9, 2009 ORDER
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